No. [redacted] 84

IN THE

Supreme Court of the United States

October Term 1961

UNITED STATES OF AMERICA, *ex rel.*
CHARLES NOIA,

Respondent,

—against—

EDWIN M. FAY, as Warden of Greenhaven Prison, State of New York, and THE PEOPLE OF THE STATE OF NEW YORK,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWARD S. SILVER
District Attorney
Kings County, New York
Attorney for Petitioners

WILLIAM I. SIEGEL
Assistant District Attorney
Of Counsel

32 CASE PRESS INC., 421 Hudson St., N. Y.—ORegon 5-4540

TABLE OF CONTENTS

AUTHORITIES CITED

Cases:

IN THE

Supreme Court of the United States

October Term 1961

No.

UNITED STATES OF AMERICA, *ex rel.* CHARLES NOIA,

Respondent,

—against—

EDWIN M. FAY as Warden of Greenhaven Prison, State of New York, and THE PEOPLE OF THE STATE OF NEW YORK,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associates Justices of the Supreme Court of the United States:

EDWARD M. FAY, Warden of Greenhaven Prison, State of New York, and THE PEOPLE OF THE STATE OF NEW YORK, the petitioners herein, respectfully pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered on February 7th, 1962 which reversed the denial of an application for a writ of habeas corpus by the District Court, Southern District of New York.

Previous Proceedings

The judgment to which the petition for the writ was addressed was entered in the County Court of Kings County, New York, on March 2, 1942. It convicted appellant, Santo Caminito and Frank Bonino of the crime of Murder in the First Degree in the killing of one Murray Hammeroff during the commission of a robbery. The jury made a recommendation of clemency pursuant to Penal Law, Section 1045-a and the Court, accepting the recommendation, sentenced all defendants to a term of imprisonment for natural life.

Respondent Noia did not appeal from the judgment. This crucially important fact will be dwelt upon at length in subsequent portions of this petition.

Caminito and Bonino appealed to the Appellate Division of the Supreme Court, Second Judicial Department, which affirmed the judgment (265 App. Div. 960); and upon appeal to the New York Court of Appeals, the judgment was again affirmed (291 N. Y. 541).

At the trial, the jury were instructed with respect to all defendants that the sole evidence against them was the confession by each of his participation in the robbery. The jury were further instructed that as respects respondent, his confession admitted that it was he who had fired the fatal shot. The case was submitted to the jury with regard to Caminito and Bonino only on a felony murder theory and concerning respondent was submitted on both common law and felony murder theories. At the trial, all defendants testified that their confessions were involuntary and had been wrung from them by police brutality and illegal delay

in arraignment. The fact that the jury included respondent in their recommendation for clemency shows, of course, that he, like his co-defendants, was convicted on the felony murder theory.

In the appeals which followed, Caminito and Bonino urged upon the Appellate Division and the Court of Appeals the involuntary nature of their confessions.

Following the affirmance of the judgment by the Court of Appeals, Caminito made two motions for reargument. Both were denied (297 N. Y. 882; 307 N. Y. 686). His subsequent petition to the United States Supreme Court for certiorari was likewise denied (Black and Douglas, *JJ.* dissenting; (348 U. S. 839)). Caminito then petitioned the United States District Court for the Northern District of New York for a writ of habeas corpus, alleging therein the same ground of coerced confession which he had presented to the State Courts and to the Supreme Court of the United States. The petition was dismissed (Foley, *D.J.*, 127 F. Sup. 689). However, upon the appeal to the United States Court of Appeals for the Second Circuit, the District Court was unanimously reversed and the writ of habeas corpus was sustained (222 F. 2d 698). New York applied to the United States Supreme Court for a writ of certiorari, but the petition was denied (350 U. S. 896).

Bonino, availing himself of the happy result which had accrued to Caminito, moved in the New York Court of Appeals for reargument of its judgment of affirmance against him. The motion was granted (309 N. Y. 950); and upon reargument the Court reversed the judgment of conviction and ordered a new trial (1 N. Y. 2d 752).

The Supreme Court's denial of certiorari to New York in the *Caminito* case was followed by orders of the Kings County Court dismissing the indictment against him and vacating the judgment against Noia. The People appealed from both orders in a consolidated appeal and the Appellate Division reversed them both, thus effectuating the reinstatement of the indictment against Caminito and the judgment of conviction against Noia (4 App. Div. 2d 697, 698). The Appellate Division's order was affirmed upon appeal by Caminito and Noia to the Court of Appeals (3 N. Y. 2d 596).

In the Court of Appeals, Fuld, *J.* wrote on behalf of a unanimous Court:

> "With regard to the appeal taken by Noia, to which we now turn, the Appellate Division reversed the order of the Kings County Court vacating and setting aside the judgment of conviction against him. As noted above, Noia did not appeal from the judgment of conviction, as had Caminito and Bonino, nor did he seek, as had Caminito, relief by way of habeas corpus in the federal courts. In fact, it was not until June of 1956, after this court had reversed the judgment against Bonino and after the Kings County Court had dismissed the indictment against Caminito, that Noia made the motion resulting in the order now before us. He maintains that he stands in the same position as Caminito and Bonino and that, despite his acceptance of the conviction and his failure to appeal from the judgment, the trial court has 'inherent power' to set aside its own judgment procured in violation of constitutional right.
>
> Not having participated in the appeals prosecuted by his codefendants, Noia is not entitled to the beneficial results that they obtained. Some years ago,

we held that the nonappealing codefendants of one whose conviction was reversed on appeal have 'no remedy * * * through the court'; the judgments recorded against them 'stand' and 'they must serve their sentences.' (People v. Rizzo, 246 N. Y. 334, 339). Their only recourse the court observed, was to the Governor for executive clemency.

Nor does the revitalization of coram nobis in this state since 1943 (see Matter of Lyons v. Goldstein, 290 N. Y. 19) change that and afford Noia a remedy in the courts. We have already adverted to the fact that at the trial the defendant claimed that his confessions were procured through coercive methods. The court left that question to the jury and, when its finding proved adverse to his contention and a judgment of conviction was rendered against him, Noia could have had the issue reviewed, as did his codefendants, on appeal and in the subsequent proceedings. His failure to pursue the usual and accepted appellate procedure to gain a review of the conviction does not entitle him later to utilize the present day counterpart of the extraordinary writ of error coram nobis. (see, e.g., People v. Sullivan, 3 N. Y. 2d 196, 198). And this is so even though the asserted error or irregularity relates to a violation of constitutional right. (see Davis v. United States, 214 F. 2d 594, 596 cert. denied 353 U. S. 960; Howell v. United States, 172 F. 2d 213, 215, cert. denied 337 U. S. 906). While the scope of coram nobis has been somewhat expanded beyond its original office (see e.g. People v. Shaw, 1 N. Y. 2d 30; People v. Kronick, 308 N. Y. 856), it still remains an emergency measure employed for the purpose for which it was initially designed, of calling up facts unknown at the time of the judgment. The present, quite obviously, is not such a case."

Respondent then, on February 4, 1960 petitioned the United States District Court for the Southern District of New York for the issuance of a writ of habeas corpus and on February 5, 1960 an order to show cause why such writ should not issue directed to appellant warden, the Attorney General of the State of New York and the District Attorney of Kings County was made by Honorable Sidney Sugarman, a United States District Judge.

The District Attorney appeared in opposition on behalf of all parties to whom the order had been issued and filed an affidavit executed by Assistant District Attorney William I. Siegel on February 10, 1960. Presiding on that day was Honorable John N. Cashin, United States District Judge. As a result of the proceedings to this point, hearings were held on March 8, 1960, March 15, 1960 and March 31, 1960 before Cashin, *D.J.* Respondent appeared by counsel, Maurice Edelbaum, Esq. and petitioner appeared by William I. Siegel, Assistant District Attorney of Kings County. (The substance of these hearings appears on pages 8 *seq.* of this petition under the heading "Record Facts Material to the Questions Presented").*

---

* Since these hearings, and the entire matter now sought to be reviewed through the medium of the writ of certiorari, are in no way concerned with the merits of respondent's conviction in the Kings County Court, but only with the question of his right to seek a Federal writ of habeas corpus, the evidence presented in the Kings County Court trial will not be touched upon in this petition. However, the record on appeal in the New York Supreme Court, Appellate Division, will be submitted to this Court so as to be available should the Court desire to examine it. That record was also before this Court when New York applied unsuccessfully to the Court for a writ of certiorari with respect to Caminito (denied in 350 U. S. 896).

Opinions Below

The District Court opinion is reported in 183 F. 2d 222. The opinions of the United States Court of Appeals have not as yet been officially reported.

Jurisdiction

The jurisdiction of the District Court was invoked by respondent under Title 28, Section 2254, United States Code. The jurisdiction of this Court is invoked by petitioners under Title 28, Section 2101-d, United States Code and Rule 22 of the Revised Rules of this Court effective July 1, 1954.

Applicable Statutory Provisions

(1) Title 28, Section 2254, United States Code:

> "An applicant for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

(2) New York Code of Criminal Procedure, Section 517:

> "In what cases appeals may be taken by defendant. An appeal may be taken by the defendant as of right

from a judgment of conviction in a criminal action or proceeding as follows:

1. • • • ;

2. Where the judgment is other than of death in the City of New York (a) to the Appellate Division of the Supreme Court of the department in which the conviction was had, from a conviction by the Supreme Court or by the Court of General Sessions of the County of New York or a County Court, or from a conviction by a Court of Special Sessions; (b) to the Appellate Part of the Court of Special Sessions, from a conviction by a City Magistrate;

• • •."

Record Facts Material to the Question Presented

The Hearing in the District Court*

At the hearing on March 8, 1960, no testimony was taken, the hearing being devoted to argument on the question of respondent's right to the issuance of a writ. In substance, his counsel contended that Title 28, Section 2254, United States Code, in referring to the exhaustion of State remedies, meant exhaustion of State remedies available to the defendant at the time of the presentation of the petition for the Federal habeas corpus writ (S.M. p. 11 *seq.*). Petitioners answered that on the contrary the Federal statutes' basic requirement of exhaustion of State remedies meant all remedies which at any time in the past had been available to the defendant (16 *seq.*; 19 *seq.*).

---

* The minutes of the hearing will be presented to the Court together with this petition. All references hereinafter made are therefore to such minutes.

On the proceedings on March 15, 1960, petitioner's counsel conceded that with respect to respondent as well as his co-defendants at the trial, the People's case consisted solely of evidence of confessions plus the *corpus delicti* and that the trial Judge had charged the jury that if they did not find the confessions to be voluntary and/or truthful, they were obligated to acquit all the defendants (27).

Testimony was taken at the March 31, 1960 hearing. Respondent, appearing in person and by counsel, testified that he was represented at the Kings County Court trial by Louis J. Wacke, Esq., now known as Louis J. Walker. Following the conviction he did not ask anyone to file a Notice of Appeal in his behalf because of lack of funds and a disinclination to impose further upon his family, who were likewise financially unable to finance an appeal. He knew nothing of any right to appeal as a poor person (38) except where sentence was of death (39). His relative, Caesar Cirigliano, a lawyer, later visited him in Sing Sing and told him that no Notice of Appeal had been filed in his behalf (42).

Respondent, however, conceded under cross-examination that Mr. Walker had visited him in the jail during the thirty-day period following the judgment of conviction during which he could have appealed. There was talk of such an appeal; but according to respondent, "he was talking about an appeal, but at the time I did not want an appeal" (43). This was due to his lack of funds (44).

Mr. Walker testified under call by petitioners. His practice from 1927 when he was admitted, to 1942 when he represented respondent, was substantially a criminal practice (46). He visited respondent in the Raymond Street jail

during the thirty day period in which a Notice of Appeal could have been filed. Caminito and Bonino had decided to appeal from the judgment (49) and Mr. Walker asked respondent if he wished that the same step be taken in his behalf, Mr. Walker being of the opinion that "an appeal would result favorably to his case" (50). Respondent negatived the suggestion. The reason given to him by Mr. Walker goes to the very nub of the present case (50).

> "A. (Continuing) My recollection is that he gave me a couple of reasons why he did not want to appeal.
>
> Q. Do you remember what those reasons were? A. One of them was that he felt that if there was a reversal and a new trial was ordered, maybe the next jury would not recommend mercy.
>
> He also told me, in substance, that his family was very financially embarassed and had no funds, but I do not think that was gone into too deeply. He did not want to appeal. That was it."

Mr. Walker testified further that he had advised respondent of his right to apply to the Appellate Division which upon showing of merit would permit the appeal to be heard on original typewritten records and would also assign counsel (55).

Respondent, according to Mr. Walker, was familiar with a contemporaneous case in which a defendant, Hull, had appealed a judgment of conviction for Murder in the First Degree with a recommendation, and upon re-trial was again convicted of that crime without a recommendation (59):

> "Q. Who proposed the Hull case to him first? A. I do not remember. I remember it was discussed. I remember every question that this man asked me as

> to his position, what would happen if a reversal came, could it happen like that case, maybe he would go to the chair on the second trial, and whatever was discussed I gave him a legal answer."

Finally, Mr. Walker testified, he offered to file a Notice of Appeal for respondent if he should decide within thirty days to do so. No request was ever made that it be done (63).

Respondent, recalled, denied having discussed the Hull case with Mr. Walker or having told the lawyer that his reason for not wanting to appeal was fear of the electric chair (63).

The District Court, in its opinion and decision dismissing the writ (183 F. S. 222), fully reviewed the history of the litigation with respect to all defendants, Caminito, Bonino and Noia from the time of the trial in the Kings County Court to the beginning of the instant petition for a writ of habeas corpus by Noia. The Court also analyzed the testimony at the hearing before it. It concluded that indigency alone does not excuse a State-Court defendant's failure to appeal from a judgment of conviction. *United States ex rel. Kozicky v. Fay*, 284 F. 2d 520. As to the requirements of Title 28, Section 2254, United States Code, for the exhaustion of State remedies as a condition precedent to the invocation of Federal jurisdiction, the District Court, held:

> "In one sense, of course, the relator has exhausted his state court remedies since there is no proceeding available to him in the State, apart, of course, from executive clemency, which can effect his release from a patently unconstitutional detention. However, exhaustion of state court remedies does not only mean

> that at the time of the petition before the Federal District Court there is no remedy available in the State. It further means that the relator has availed himself of at least one corrective process available in the courts of the state if there be such a process. (Ex parte Hawke (1944), 321 U. S. 114; Brown v. Allen (1953), 344 U. S. 443). That there was a state court process available to the relator is obvious since the codefendants have obtained their releases."

The District Court refrained from making any finding of facts concerning respondent's contentions of poverty or with respect to the proof that, on the contrary, his failure to appeal was voluntary and due to a fear of possible results. It dismissal of the writ rested solely on the basis that:

> "On the reasoning in the authorities cited above I feel constrained to dismiss the writ because of relator's failure to exhaust his state court remedies."

Question Presented

Petitioners contend that the United States Court of Appeals erred in its judgment holding that respondent was entitled under Section 2254 of the United States Code and governing law to have issued to him a writ of habeas corpus and in overruling the District Court's order which had dismissed the petition for the writ upon the ground that respondent had failed to exhaust his State Court remedies. It is petitioner's contention that respondent, by having failed to appeal to the Appellate Division of the New York Supreme Court and to the New York Court of Appeals as did his co-defendants Caminito and Bonino, had foreclosed himself from all Federal relief.

POINT I

The petition for the writ of habeas corpus was properly denied on the ground that respondent, having failed to exhaust his State remedies, was not entitled to the writ. The Court of Appeals erred in reversing the order dismissing the petition.

United States Code, Title 28, Section 2254 explicitly requires the exhaustion of State remedies as a condition precedent to an application for a Federal writ of habeas corpus. The section is but a codification of a rule firmly established by this Court long prior to its enactment. In *Ex Parte Hawke*, 321 U. S. 114, this Court in denying an application for leave to file an original petition for the writ, wrote:

> "The denial of relief to petitioner by the Federal Courts and Judges in this, as in a number of other cases, appears to have been on the ground that it is a principle controlling all habeas corpus petitions to the federal courts, that those courts will interfere with the administration of justice in the state courts only 'in rare cases where exceptional circumstances of peculiar urgency are shown to exist' (citing)."

Indeed, the Revisor's note to Section 2254 points out that the Section is "declaratory of existing law as affirmed by the Supreme Court (see *Ex parte Hawke*, 1944, 64 S. Ct. 448, 321 U. S. 114, 88 L. ed. 572)."

The entire current of cases decided since the enactment of Section 2254 is in strict and literal conformity with this language. Thus, in *Brown* v. *Allen*, 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397, the Supreme Court was faced with a situation which, if any state of facts could justify a relaxa-

tion of the rule, constituted such justification. A defendant convicted in a State Court and sentenced to death had his appeal dismissed by the highest court of the State because the prisoner's attorneys had not served the proper statement of the case until one day after lapse of the period within which service should have been made. In upholding the denial of the writ of habeas corpus, the Supreme Court wrote:

> "The writ of habeas corpus in federal courts is not authorized for state prisoners at the discretion of the federal court. It is only authorized when a state prisoner is in custody in violation of the Constitution of the United States. 28 U.S.C. Sec. 2241. *That fact is not to be tested by the use of habeas corpus in lieu of an appeal.* To allow habeas corpus in such circumstances would subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime. * * * *
>
> Finally, federal courts may not grant habeas corpus for those convicted by the state except pursuant to Section 2254. * * * The statute requires that the applicant exhaust available state remedies. *To show that the time has passed for appeal is not enough to empower the Federal District Court to issue the writ.*" (Italics ours)

In *Michel* v. *Louisiana*, 350 U.S. 91, also a capital case, this Court refused to pass upon a constitutional claim because the defendant had failed to comply with State procedure in that he had not objected to the legality of the Grand Jury (on the ground of systematic exclusion of Negroes from the panel) during the three judicial days following the end of the Grand Jury's Term. He did do so on the fifth day. The Court refused to entertain the case even

though Mr. Justice Black in dissent asserted that historically only one Negro had ever been selected to serve on a Grand Jury in that parish.

The striking fact existing in both *Brown* v. *Allen* and *Michel* v. *Louisiana*, *supra*, is that the State Court defendants in these cases had attempted to fulfill State Court procedural requirements and had only narrowly failed to do so with complete sufficiency. In contrast, Noia had completely and voluntarily refused to take the appeal to which New York had given him an absolute right under its Code of Criminal Procedure, Section 517.

The United States Court of Appeals for the First Circuit has heretofore governed itself according to the statute. *United States ex rel. Martino* v. *Martin*, 174 F. 2d 582; *United States ex rel. Williams* v. *LaVallee*, 276 F. 2d 645, cert. den. 364 U. S. 922; *United States ex rel. Kozicky* v. *Fay*, 248 F. 2d 520. In *Kozicky*, *supra*, Waterman, *C.J.* (the author of the majority opinion in the case at bar) wrote for a unanimous panel:

> "If the State provided such a remedy, (i.e., an appeal) and the petitioners failed to take advantage of it, we hold they cannot obtain a writ of habeas corpus from a Federal Court. This result is a necessary consequence of 28 U.S.C.A. Section 2254."

The strictness with which the rule is applied is illustrated with particular force by *United States ex rel. Williams* v. *LaVallee*, *supra*. In *Williams*, the State defendant did in fact appeal to the Supreme Court upon a constitutional question certified by the State Court of Appeals. He did not, however, procure a certification of the question of coerced confession to be presented on the appeal, nor did he

seek certiorari in order to present this question to the Supreme Court. The Court of Appeals held:

> "In so limiting the issues assigned counsel for relator made the choice of assuring their client, as a matter of right, Supreme Court review of the one appropriate question (sentencing procedure) rather than risking discretionary certiorari review of both federal questions (sentencing procedure plus coercion). That choice resulted in a failure to exhaust state remedies because the remaining question, having been previously heard by the state courts, should have been thereafter offered for review to the Supreme Court. This was not done and hence the coercion question was not properly before the District Court. Darr v. Burford, 239 U. S. 200 (1950); Ex parte Hawke, 321 U. S. 114 (1944)."

Section 2254 was enacted for an important constitutional reason and in order to effectuate a result of paramount importance. It has been thus put in *Darr* v. *Burford*, 239 U. S. 200:

> "This favorable attitude toward procedural difficulties accords with the salutary purpose of Congress in extending in 1867 the scope of federal habeas corpus beyond an examination of the commitment papers under which a prisoner was held to the 'very truth and substance of the causes of his detention'. Through this extension of the boundaries of federal habeas corpus, persons restrained in violation of constitutional rights may regain their freedom. But since the 1867 statute granted jurisdiction to federal courts to examine into alleged unconstitutional restraint of prisoners by state power, it created an area of potential conflict between state and federal courts. As it would be unseemly in our dual system

> of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation, the federal courts sough a means to avoid such collisions. Solution was found in the doctrine of comity between courts, a doctrine which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.

The reason has been expressed by Justice Frankfurter in *Irvin* v. *Dowd,* 359 U. S. 394, 408, with his usual felicity of phrase:

> "Something that thus goes to the very structure of our federal system in its distribution of power between the United States and the States is not a mere bit of red tape to be cut, on the assumption that this court has general discretion to see justice done. Nor is it one of those 'technical' matters that laymen, with more confidence than understanding of our constitutional system, so often distain."

It is true that the rule has been relaxed on rare occasion and under strictly limited circumstances, *Thomas* v. *Arizona,* 356 U. S. 290; *Frisbe* v. *Collins,* 342 U. S. 519. This Court in *Brown* v. *Allen, supra,* itemized the limited instances of exception:

> "Of course, federal habeas corpus is allowed where time has expired without appeal when the prisoner is detained without opportunity to appeal because of lack of counsel, incapacity, or some interference by officials."

And in *United States ex rel. Williams* v. *LaVallee, supra,* the Court of Appeals for the First Circuit wrote on the subject:

> "That exception generally applies where the State determination is on non-federal grounds, e.g., a procedural bar within the state appellate process, from which certiorari jurisdiction cannot be invoked. White v. Ragan, 324 U. S. 760 (1945). It may also apply in certain situation, not applicable to the instant petition, where the State has been tardy in objecting to the federal proceedings or where the circumstances are such that prompt federal intervention is essential."

In the face of this strong *caveat* expressed in the statute, in its own decisions and in the decisions of the Supreme Court, the Court below by its majority has nevertheless held respondent to be entitled to be succored by the Federal writ from the consequences of his affirmative refusal to avail himself of State remedies. The question presents itself: Why this departure from principle and practice? The majority of the Court examined three bases upon which to consider the problem. We discuss them *seriatim.*

First, the majority held that Noia had not waived his right under the Fourteenth Amendment "not to be tried and convicted solely upon his coerced confession".

The majority then considered the question of exhaustion of State remedies and concluded:

> "We believe that if there are facts in a case so unique as to make an independent state ground of decision, elsewhere reasonable and adequate, inade-

> quate in that particular case to bar federal habeas corpus, those facts are likewise sufficient to create an exceptional case within the contemplation of section 2254 so as to permit the issuance of the federal habeas corpus writ."

The majority then turned to that phase of the case which, although denominated by it as "the independent and adequate state ground of decision", really referred to the adequacy of *presently* available state avenues of relief. Their conclusion was expressed in striking language:

> "Thus we come to the last scene in this human drama. Is there an adequate state ground in this case dooming relator to life imprisonment? Our answer is No; the state ground here is inadequate. We must realize that adequacy is a term of relativity. No state ground is entitled to unqualified deference. As we noted in the last paragraph, for the state ground to be adequate, it must be reasonable."

We have called this quote "striking language". With great deference to the majority of the Court below, it is our submission that striking as the language is, it is at the same time an expression of a human reaction completely unsupported by either legal principle or judicial precedent. As Moore, *C.J.* in his dissent recognized:

> "Thus, the majority has 'come to the last scene in this human drama' 'dooming relator to life imprisonment.' Legal principles having failed to produce the desired result, resort must be had to a tour de force by the fiat that 'No state ground is entitled to unqualified deference' and 'adequacy' in any event is but 'a term of relativity'. After all, 'for the state ground to be adequate, it must be reasonable,' and

what could be more unreasonable than requiring a defendant to appeal?

From here on the denouement comes rapidly. The 'simple failure to appeal, reasonable enough to prevent federal judicial intervention in most cases, is in this particular case unreasonable and inadequate'."

It is our respectful submission that the decision of the majority of the Court below, if permitted to stand, will have three results prejudicial to the administration of the criminal justice.

First, it will practically have eliminated all of the procedural rules which New York and the other States of the Union have reasonably and within their constitutional power enacted to govern the exercise of the right of appeal in those cases where the States have granted such right. (That it is within the constitutional power of the States either to grant or to withhold the right of appeal cannot be questioned.)

Secondly, by so doing, the decision of the majority will have accomplished the harmful result,—and without good reason,—of destroying what Mr. Justice Frankfurter in *Irvin* v. *Dowd, supra,* described as "something that thus goes to the very structure of our federal system in its distribution of power between the United States and the States."

Lastly, we do not believe that we are prophets of doom when we suggest the realistic probability that this decision will, if not reversed, let loose upon Federal District Courts a deluge of applications for writs of habeas corpus by State defendants who have in the years past failed to appeal from

judgments of conviction and who now will see in this decision the opening of a gate of relief which neither they nor others better versed in the law have heretofore considered to be possible. As Moore, *C.J.* wrote in his dissent:

> "The opinion of the majority could have been written in one sentence substantially, as follows: 'In any criminal case in a State court wherein a confession was introduced and a conviction resulted, the defendant may, at any time thereafter without appealing such conviction or exhausting any other available state remedy, claim upon petition for a writ of habeas corpus that such confession was coerced and, upon a finding to that effect by a federal judge, a writ shall issue to the State directing the defendant's release from custody (citing cases if there be any).' If this is to be the rule of law, is not a reappraisal of our criminal procedure in this field called for? If the delicate balance of the State-Federal relationship is to be upset, possibly the majority's approach is best, namely, upset it drastically. If each case is to be decided on its own 'exceptional situation' basis, let this principle be declared so that consideration of the scores of habeas corpus appeals which come before this court every year can be unfettered by legal principles. No longer will it be necessary after due deliberation to write 'Failure to exhaust State remedies' or 'No federal question.' And in fairness to the two distinguished appellate courts in New York, would it not be better to advise them that in any case before them involving a coerced confession they are but puppets whose strings may be cut at any time by the keen edge of the 'Great Writ'. It may well be that there should be a definite rule that no case involving an allegedly coerced confession should be tried in a state court or, stated differently, that such a case should be tried only

before a federal judge. Whether this should be is for those far more learned in such matters than I to determine. I point out only that such is not the law at the present time—at least until the filing of the majority opinion.

I would affirm."

We do not hope to improve upon either the rationale or the expression of Judge Moore's dissent. Nevertheless, we feel it proper to close this petition with a statement of our own belief, sincerely held, that the sovereignty of the States,—of greatest importance in our federal structure,—should not be infringed or diminished except upon compelling necessity, determined to exist within the framework of constitutional law. Certainly this result should not follow because two Federal Judges differ from seven Judges of the New York Court of Appeals in their personal reaction to the exigencies of an individual's situation. (See opinion of Fuld, *J.* for a unanimous Court, 3 N. Y. 2d 596, p. 4, *supra*). It is our respectful submission that in the case at bar the sovereignty of the State of New York has been disregarded by a decision which itself disregards the law as formulated by this Court,—law which up to the time of the instant decision has been followed by all Federal Courts.

It is therefore our prayer that the writ of certiorari be allowed in order that the State of New York may in this Court have an opportunity to right a wrong decision.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully pray that this Court issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review its judgment reversing the denial of respondent's application for a writ of habeas corpus.

Dated: Brooklyn, New York,
March 1962.

Respectfully submitted,

EDWARD S. SILVER
District Attorney
Kings County

WILLIAM I. SIEGEL
Assistant District Attorney
Of Counsel